Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

HOANG VAN TU, NGUYEN THI KHUONG; NGUYEN DINH; TRAN NAM; TRUONG THAIN; PHAM DAT; PHAM THI THUAN, and S. AUSTIN JOHNSON,

Petitioner(s)

vs.

PT. MICHAEL TERRY; LT. WILLIAM RUSTY CALLEY; and CPT. ERNEST L. MEDINA.,

Respondent(s)

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

S. Austin Johnson
Johnson Law Firm, LLC
204 East 860 South
Orem, Utah 84058
(801) 426 – 7900
Attorney for Petitioners

Dennis R. Ickes, Esp.
Counsel of Record
4257 Panorma Dr.
SLC, UT 84124
(801) 272 – 0691

QUESTIONS PRESENTED FOR REVIEW.

The Tenth Circuit affirmed the district court's dismissal with prejudice of Defendants Lt. William "Rusty" Calley and Private Michael Terry in this cause of action for civil damages for war crimes, extrajudicial killings and other atrocities committed on March 16, 1968, at the village of My Lai, Vietnam. Plaintiffs, class representatives of the victims of the My Lai Massacre, sought to recover civil damages for the injuries suffered by filing causes of action under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 29 L.Ed.2d 619 (1971)("Bivens" action), and the Alien Tort Claims Act ("ATCA"), 28 U.S.C. Section 1350. The causes of action were held to be time-barred by the Torture Victim Protection Act, which was enacted 24 years after the cause of action accrued, and by the four year personal injury limitation of action statute in the State of Utah. The court ruled that no tolling provision extended these causes of action so they were time-barred. In holding that the causes of action were time-barred, the Tenth Circuit decision directly conflicts with holdings of this Court, the Supreme Court of the State of Utah, and the Ninth Circuit, which recognize tolling of these causes of action during a time of war.

Three Questions are presented:

I. Whether the U.S. soldiers who acted under color of federal law and committed extrajudicial killings and rape at My Lai, Vietnam, on March 16, 1968, may be liable in a *Bivens* action for injuries and death caused by their unlawful conduct because the Four year limitation period for bringing the cause of action was tolled by extraordinary circumstances, including war and lack of recognition of a country following the war.

II. Whether the U.S. soldiers who committed the extrajudicial killings and rape of the civilians at My Lai, Vietnam, are liable for damages under the ATCA because the 10 year statute of limitations was tolled by extraordinary circumstances including the war, non-recognition of the enemy country, poverty, lack of freedom of travel, and other circumstances.

III. Whether it was an abuse of discretion for the trial court to award attorneys fees against Plaintiffs and their counsel for bad faith in bringing vexatious

litigation if the cause of action was timely filed.

LIST OF PARTIES TO PROCEEDING.

The parties are Hoang Van Tu, Nguyen Thi Khuong, Nguyen Dinh, Tran Nam, Truong Thain, Pham Dat, and Pham Thi Thuan. These plaintiffs are seven victims of the My Lai massacre. They all reside in and are citizens of Vietnam. They are class representatives of all of the victims of the My Lai massacre.

Defendant-Appellee Lt. William "Rusty" Calley was the commanding officer of Charlie Company who led the military operation against the village of My Lai on March 16, 1968.

Defendant Private Michael Terry is a resident of the State of Utah and was a participant in the military operation against the village of My Lai.

Captain Ernest L. Medina was a party to the action but he was dismissed without prejudice by the U.S. district court. The United States of America filed a brief on appeal in support of the trial court's dismissal of the action with prejudice against the two other defendants. Defendant Captain Medina had been previously dismissed without prejudice by

the district, which held that the district of Utah lacked minimum contacts with Captain Medina to satisfy personal jurisdiction requirements.

Other commanding officers and soldiers were named in the complaint but they have not been served and were not made parties to this cause of action.

Counsel for Plaintiffs, S. Austin Johnson, is a party to the extent that the district court held that he is liable for the attorneys fees incurred by Defendant Terry for bringing this vexatious cause of action in bad faith, after the statute of limitation had expired.

CORPORATE DISCLOSURE STATEMENT

No party to this action is a corporation, has stock issued or is publicly held. All parties are individuals.

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Van Tu v. Koster, 364 F.3d 1196 (10th Cir. 2004).

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. Section 1254. The U.S. Court of Appeals of for the Tenth Circuit entered a decision in this matter, which is a civil case. The federal district court had jurisdiction over the cause of action under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 29 L.Ed.2d 619 (1971)(*"Bivens"*), and 42 USC Section 1983; and the Alien Tort Claims Act ("ATCA"), 28 U.S.C. Section 1350.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Fourth Amendment, U.S. Constitution, reads:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated....

Fifth Amendment, U.S. Constitution, reads:

No person shall be ... deprived of life, liberty, or property, without due process of law;

28 U.S.C. Section 1350, the Alien Tort Claims Act, ("ATCA") provides:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

The Torture Victim Protection Act (TVPA) was enacted by Pub.L. 102-256, 106 Stat.73, on March 12, 1992. It provides:

...

(2)(a) An individual who, under actual or apparent authority , or color of law, of any foreign nation — subjects an individual to torture shall, in a civil action, be liable for damages to that individual;

...

(c) Statute of limitations. --No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

Section 78-12-25, Utah Code:

An action may be brought within four years:

...

(3) for relief not otherwise provided for by law.

Section 78-12-39, Utah Code (2002);

When a person is an alien subject or a citizen of a country at war with the United States, the time of the continuance of the war is not a part of the period limited for the commencement of the action.

STATEMENT OF THE CASE.

Plaintiffs are class representatives of the victims of the My Lai massacre that occurred on March 16, 1968. Each of the seven representatives are actual survivors of the massacre. They are citizens of Vietnam and domiciled at the Village of Son My, Quang Ngai Province, in Vietnam.

On March 16, 1968, the United States Army, under the command of Defendant Lt. William "Rusty" Calley, invaded the South Vietnam village of My Lai.

The soldiers detained, raped and executed or injured over five hundred non-combatant civilians, the vast majority of whom were women and children. The soldiers also set fire to the village, burning the homes to the ground. There are only about 45 known survivors of these atrocities.

Defendant Michael B. Terry was a fire team leader in the third platoon of Charlie Company on March 16, 1968. He assisted in carrying out military operations against the village. He is a resident of the State of Utah. Defendant Lt. Calley is a resident of the State of Georgia.

Plaintiffs filed this cause of action on October 12, 2000, stating a *Bivens* action and an Alien tort claim under 28 U.S.C. Section 1350. They claim money damages for wrongful death, pain and suffering, permanent disfigurement, battery, severe emotional distress, decreased enjoyment of life, loss of consortium, lost wages and earning capacity, past and future, and property damage.

Defendant Terry moved to dismiss plaintiffs' cause of action, arguing that it is time-barred by all relevant statutes of limitations. The U.S. District Court for the District of Utah granted the motion and dismissed all defendants on September 23, 2002, before any discovery or evidence was presented. See

Appdx. C.

Defendant Captain Medina was dismissed without prejudice because the district court held he did not have minimum contacts with Utah for the court to exercise personal jurisdiction over him.

Defendant Lt. Calley did not move to dismiss his cause of action based on his lack of contact with the State of Utah. His motion, on other grounds, was denied by the trial court. But when the trial court granted the motion to dismiss of Defendant Terry, it, *sua sponte*, dismissed the causes of action against Defendant Calley. It held the causes of action were time-barred. Appdx. A at 9a.

The Tenth Circuit followed the district court and applied the 4 year SOL for personal injury actions in the State of Utah and held that a *Bivens* action had to be filed by March 16, 1972, absent tolling. Opin. at 6. The Tenth Circuit also decided that the ATCA was time-barred by the 10 years statute of limitation, which it borrowed from the TVPA. Appdx. at 7a.

The Tenth Circuit held that plaintiffs failed to make a sufficient showing to toll the statute of limitation because of plaintiffs poverty, status as subjects of a Communist government, the Vietnam War, and their inability to travel. The court rejected

the equitable tolling argument. Appdx. A at 8a.

The Tenth Circuit also affirmed the district court award of attorneys fees to Defendant Terry in the amount of $12,055.50, finding it was not an abuse of discretion to award attorneys fees under the court's inherent power to sanction conduct that abuses the judicial process. Appdx. B.

REASONS FOR ALLOWANCE OF THE WRIT.

Whether a *Bivens* action and the ATCA action may be brought by aliens residing in the foreign country of Vietnam is an important question, implicating the extra-territorial application of the United States Constitution as a standard of conduct for, or imposing duties upon, United States troops abroad in a time of war in their conduct toward non-combatant civilians. This writ will help define the limits or acceptable and unacceptable bounds of conduct. U.S. soldiers are being used in foreign countries to quash growing terrorism in the world. The example of U.S. soldiers, and Americans, given during these difficult circumstances may have a great impact in opening other peoples minds and hearts to the principles of the U.S. Constitution and the high ideals, standards and virtues of the United States.

Soldiers serving in foreign countries, with extreme temperatures, in the midst of hostilities, may be frustrated by the limitations imposed in the settings, by the violence they experience, and by the lack of gratitude from their hosts. They protect the civilian population of those foreign countries from the terrorists, and install a modern, western system of constitutional law, democracy, and order with individual rights and privileges of freedom, liberty and worship in other systems of law and cultures. The examples of these soldiers and of our country make a great impact on the success of reaching these objectives. This example, governed by constitutional law, is a light set on a hill for all to see.

The individuals who make up the U.S. military are governed in their conduct toward non-combatant civilians of other countries by rule of law. These rules impose duties. The rule of law includes duties derived from the U.S. Constitution. These duties include keeping their actions within appropriate boundaries or limits. The law must impose these duties by setting and enforcing consequences for the breach of these duties. The *Bivens* action and the ATCA both provide a remedy to alien victims, who reside in foreign countries, who have suffered injury by outrageous, wanton tortious conduct by soldiers who violate these boundaries of acceptable conduct.

This Court, by granting a writ of certiorari, will validate the *Bivens* and ATCA cause of action as a means of protecting the rights and privileges of all mankind and giving redress for serious atrocities committed in a war setting against civilian non-combatants by U.S. actors. Recognizing these causes of action will reinforce the duties the U.S. Constitution imposes on our soldiers, wherever they are.

The Tenth Circuit opinion casts doubt on the existence of a *Bivens* action as a means for aliens abroad to protect themselves from unlawful conduct by U.S. troops. It casts doubt on whether the U.S. constitution imposes duties or standards of conduct on the troops who act under its auspices.

The Tenth Circuit opinion is contrary to this Court's direction that a federal statute of limitation, and federal tolling doctrines, should be used where the statutory or implied cause of action has no stated statute of limitation, and it directly implicates national issues.

The Tenth Circuit's decision in this case stands alone in holding that war does not toll the statute of limitations. This Court, in resolving conflicts between citizens of the Northern and Southern states after the end of the Civil War, recognized that war tolls the statute of limitations until the conflict is over. Similar case law in the State of Utah is in conflict with the Tenth Circuit's opinion as well. Citizens of an enemy state, during war are under a legal disability and are denied access to the courts of the United States. This disability tolls or extends the limitation period for

bringing a cause of action until the disability is over. This writ should clarify when the tolling period ceased or when the limitation of action period began to run after the end of the Vietnam War. The tolling of the statute of limitations is appropriate because of the extraordinary circumstances that arose from the Vietnam war.

The Tenth Circuit decision failed to incorporate federal tolling doctrine with the ATCA action when it decided that the claim was time-barred by the ten year statute of limitation of the Torture Victim Protection Act, enacted 24 years after the ATCA cause of action arose.

Review by this Court also is necessary to address additional important issues posed by the Tenth Circuit opinion. First, whether the absence of tolling may be decided on a motion to dismiss, instead of allowing Plaintiffs to discover and present facts in support of the claim for tolling. Second, whether Defendant Calley was properly dismissed *sua sponte* when he did not join in the motion to dismiss. And third, whether it is an abuse of discretion to award attorneys fees against counsel for Plaintiffs, and plaintiffs, for bringing this cause of action if it is not time-barred.

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING THE APPLICATION OF A *BIVENS* ACTION TO OUTRAGEOUS TORTS COMMITTED IN FOREIGN COUNTRIES BY U.S. SOLDIERS

A *Bivens* Action allows victims of the My Lai massacre to claim compensation for the violation of rights protected by the U.S. Constitution:

Review is necessary in this matter because the Tenth Circuit, the Fifth Circuit, the D.C. Circuit, and Ninth Circuit are in conflict with this Court on whether the My Lai massacre victims may pursue a *Bivens* action for injuries they suffered in Vietnam, which were inflicted by U.S. soldiers who violated rights protected by the U.S. constitution.

Bivens is a judicially created remedy that allows recovery for damages against federal officials for violations of constitutionally protected rights, similar to 42 U.S.C. Section 1983, which allows recovery against state officials for violations of civil rights. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 29 L.Ed.2d 619 (1971). Aliens have limited due process rights. Officials may not consciously disregard or act with deliberate indifference toward a detainee's safety by knowingly placing that person in harm's way. Papa v. United States, 281 F.3d 1004, 1010 (9th Cir.2002); Lynch v. Cannatella, 810 F.2d 1363, 1375-76 (5th Cir.1987). A *Bivens* action exists against a federal official acting in his individual capacity for violation of constitutional rights. Bunn v. Conley, 309 F.3d 1002,1009 (7th Cir. 2002).

The circuit courts have taken away these rights by saying they do not apply to foreign citizens whose

rights of life, liberty and property are deprived by U.S. actors in foreign countries. The United States, on behalf of Captain Medina, argues that the U.S. Constitution does not apply to aliens whose claims arise outside the United States. Brief of Defendant-Appellee Medina, p. 33, in Van Tu v. Koster, 10th Cir. No. 02-4209, filed abt. Aug. 22, 2003, citing In re Estate of Ferdinand Marcos, 25 F.3d 1467 (9th Cir.1994); Pauling v. McElroy, 278 F.2d 252, 254.n.3 (DC Cir.1960); Zadvydas v. Davis, 533 U.S. 678, 693, 150 L.Ed.2d 653, 669 (2001)("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.")

The Tenth Circuit followed this authority to doubt that a *Bivens* action is available for the victims of the My Lai massacre in Vietnam. Opin. at 4, citing Sanchez-Espinoza v. Reagan, 770 F.2d 202, 209 (1985), ("[t]he special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad.")

This Court should find that a *Bivens* remedy is available to the citizens of Vietnam for the atrocities they suffered at My Lai.

II. APPLICATION OF THE STATE STATUTE OF LIMITATION TO WAR CRIMES COMMITTED ABROAD CONFLICTS WITH THE PRINCIPLE OF APPLYING THE

MOST CLOSELY ANALOGOUS FEDERAL STATUTE.

a. The Statute of limitations for a *Bivens* action should be borrowed from the most closely analogous federal statute.

The question of what is the appropriate statute of limitation is a question of law that is reviewed de novo. Mendez v. Ishikawajima-Harima Heavy Indus. Co., 52 F.3d 799, 800 (9th Cir.1995). A *Bivens* action does not have a statutory limitation period for filing a cause of action. It is a judicially created remedy without its own statute of limitations. Indus. Constructors Corp. v. U.S. Bureau of Reclamation, 15 F.3d 963, 968 (10th Cir. 1994).

When a cause of action arises under federal law and it does not have a directly applicable limitations period, the court should not assume that no time limit was intended. Del Costello v. Intl. Bhd. of Teamsters, 462 U.S. 151, 158, 76 Ed.2d 476 (1983). In such situations, courts apply the statute of limitations of a closely analogous federal statute, if federal law 'provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking. North Star Steel Co. v. Thomas, 515 US. 29, 35, 132 L.Ed.2d 27 (1995); Reed v. United Transp. Union, 488 U.S. 319, 324, 102 L.Ed.2d 665 (1989); World War II Era Japanese Forced Labor Litigation, 164 F.Supp.2d 1160 at 1180 (ND CAL. 2001).

The application of a federal statute of limitation is a narrow exception to the general rule that a federal court ordinarily looks to the most closely analogous state statute of limitation for guidance as to the period of limitations to be applied to *Bivens* claims and Section 1983 claims. Wilson v. Garcia, 471 U.S. 261, 276-80, 85 L.Ed.2d 254, (1985).

Federal law determines when the statute of limitation begins to run and when the cause of action accrues. Two Rivers v. Lewis, 174 F.3d 987, 991 (9th Cir.1999). The cause of action accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action. Japanese Forced Labor, 164 F.Supp.2d at 1181. The cause of action accrued on March 16, 1968, when plaintiffs suffered the outrageous conduct at the hands of the U. S. soldiers.

The Tenth Circuit applied the Utah statute of limitation of four years for a civil rights action to the *Bivens* action. Utah borrows the four year statute of limitations for personal injuries for these civil rights actions. Sheets v. Salt Lake County, 45 F.3d 1383 (10th Cir. 1995); Section 78-12-25(3), Utah Code.(2002). Hence, the court dismissed with prejudice Defendants Lt. Calley and Priv. Terry because the action was time barred. It held the action had to be filed by March 16, 1972. It also held that the limitation period was not tolled.

Application of a state statute of limitation to a *Bivens* action for outrageous torts, which are similar to torture, committed in a foreign country, is contrary to

this Court's ruling in Del Costello and Reed, supra; A federal statute of limitation from the most closely analogous statute should be applied to a *Bivens* action. The rationale for this rule is the same as that in support of a federal statute of limitation for an ATCA claim.

b. The applicable SOL for the ATCA is the ten year SOL provided by the TVPA.

The narrow exception of using a federal statute of limitation exists because states do not make their limitations periods with national interests in mind. Therefore, the courts must make sure that the importation of state law does not interfere with implementation of national policies. In re African-American Slave Descendants Lit, 304 F.Supp.2d 1027 (ND Ill 2004).

For example, the TVPA is the most closely analogous to the ATCA action and it borrows its ten year limitation of action period from the ATCA. Papa, 281 F.3d at1012. The ATCA is similar to the TVPA because it addresses torts in foreign nations that violate international law like torture and extrajudicial killings. Therefore, federal law controls the limitation period. Japanese Forced Labor, 164 F.Supp.2d at 1180. See also Iwanowa v. Ford Motor Co., 67 F.Supp.2d 424 at 462 (DNJ 1999); Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1195-96 (SDNY 1996); and Xuncax, 886 F.Supp. 162 at 192-93(D. Mass. 1995); Doe v. Islamic Salvation Front, 257 F.Supp.2d 115 (DDC 2003).

The Ninth Circuit, in Papa supra,, held that the TVPA is more analogous than the state statute of limitation for ATCA claims. It reversed the district court that had applied the most closely analogous state statute of limitation, instead of the ten years for bringing an action provided in the TVPA. 281 F.3d at 1013. By applying the most closely analogous federal statute, the cause of action was timely. Id. at 1012.

In Japanese Forced Labor, supra, the court dismissed the claims of Chinese and Korean citizens for forced labor against Japan during WWII and ruled that the claims, which arose 50 years earlier, were time-barred. But the court recognized that extrajudicial killing, in a civil action, is a violation of jus cogens norms. For such serious offenses, therefore, TVPA is the closest analogous federal statute of limitation. 164 F.Supp.2d 1160 (ND Cal 2001). This federal statute of the TVPA is the most closely analogous statute of limitation for extrajudicial killings, rape, torture and other violations of international law that occurred at My Lai. It should be applied to both the *Bivens* action and to the ATCA action.

III. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING THE APPLICATION OF EQUITABLE TOLLING OF A STATUTE OF LIMITATION TO EXTRAORDINARY CIRCUMSTANCES ARISING FROM WAR.

a. Federal law dictates the circumstances that provide tolling of the statute of limitations for a *Bivens* and ATCA cause of action.

The Tenth Circuit opinion in applying state of Utah tolling provisions to the statute of limitations conflicts with this Court and the Ninth Circuit who have recognized that war based upon federal law tolls the statute of limitations. When a federal claim is presented, federal equitable tolling doctrines apply even if it borrows the state statute of limitations. Cf. Holmberg v. Almbrecht, 327 U.S. 392, 90 L.Ed 743 (1946); Gibson v. United States, 781 F.2d 1334 at 1340 (9th Cir.1986). Federal law recognizes and applies principles of equitable tolling of statutes of limitations to every federal claim. Holmberg, 327 U.S. at 397. When borrowing the limitations period from another federal statute, federal, rather than state, tolling doctrines apply. Emrich v. Touche Ross & Co., 846 F.2d 1190, 1199 (9th Cir.1988). The ten year limitations period for an ATCA claim is subject to equitable tolling. Japanese Force Labor, 164 F.Supp.2d at 1181; Hilao v. Estate of Marcos, 103 F.3d 767, 773 (9th Cir.1996), citing S.Rep. No. 249, 102d Cong., 1st Sess, at 11 (1991).

Equitable tolling occurs under federal law in two types of situations: (1) where defendant's wrongful conduct prevented plaintiff from timely asserting his claim; or (2) where extraordinary circumstances outside plaintiffs' control make it impossible for plaintiff to timely assert his claim. Seattle Audubon Soc. v. Robertson, 931 F.2d 590, 595 (9th Cir.19991), *rev. on other grounds*, 503 U.S. 429, 118 L.Ed.2d 73

(1992); Forti v. Suarez-Mason, 672 F.Supp.1531 (ND Cal 1987). Tolling in federal courts is available absent evidence that Congress intended the contrary. Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 95-96, 112 L.Ed.2d 435, 443-44 (1990).

Equitable tolling is expressly available under the TVPA. Barrueto v. Larios, 205 F.Supp.2d 1325 (SD Fla 2002), citing H.R. Rep. No. 102-367(I)(1992). In Hilao, supra, the court did not need to decide which statute of limitation applied because equitable tolling applies to the TVPA as well as to a *Bivens* action. The Senate Report on the TVPA provides that the ten year statute of limitation is subject to equitable tolling where the defendant is absent from the jurisdiction or immune from lawsuits and for periods in which the plaintiff is imprisoned or incapacitated. Id. 103 F.3d at 773; citing S.Rep. No. 249, 102d Cong., 1st Sess., at 11 (1991).

Equitable tolling applies when a plaintiff, despite due diligence, is unable to obtain enough information to conclude that there is a basis for a claim. Slave Litigation, 304 F.Supp.2d at 1073. Plaintiffs have been legally incapacitated by the state of war, and the extraordinary circumstances that followed, which ended in April 1997. The extraordinary circumstances that arose from the war have left plaintiffs in a condition like prison, with regard to their ability to learn of their cause of action and to assert it in the U.S. courts.

When the Tenth Circuit applied state statutes of limitation and analyzed their application by the

equitable tolling doctrine of the state of Utah, it failed to place appropriate importance on the federal law concepts of the effect of war and loss of recognition of a country and how these concepts create a disability on a litigant that eliminates his access to our courts. Federal law must be used to toll the statute of limitations for the *Bivens* and the ATCA claims.

b. The Tenth Circuit is in conflict with this Court, the Second Circuit and the Supreme Court of Utah in failing to recognize that the extraordinary circumstances that arose from War toll the Statute of Limitations.

The Tenth Circuit refused to toll the statute of limitations on the *Bivens* and ATCA actions because of war. This decision is in conflict with this Court, the Second Circuit and the Supreme Court of the State of Utah. In Hanger v. Abbot, 73 U.S. 532 [6 Wall.], 18 L.Ed. 939 (1867), this Court found that the Civil War tolled the limitations period for a breach of contract claim until the restoration of peace. This Court explained that when war is imposed by one country against another it prohibits all dealings, commercial intercourse and correspondence between its citizens and those domiciled in the enemy country. The Southern States were the enemy country. The citizens of the South could not sue the citizens of the north because they were denied access to the courts during the war. Justice Clifford compared this disability to the minority of a plaintiff, where the right to sue begins when the individual reaches the age of majority because the disability is removed. Id. Justice Clifford

likewise reasoned that "trading, which supposes the making of contracts, and which also involves the necessity of intercourse and correspondence, is necessarily contradictory to a state of war." Id. Accordingly, the statute of limitation did not run during the civil war.

Likewise, in Osbourne v. United States, 164 F.2d 767 (2d Cir.1947), a plaintiff held prisoner by Japan during WWII was precluded by extraordinary events from bringing his claim and the limitations period was tolled until the barrier caused by the events was removed. When a country is at war, an alien's property may be confiscated, impounded or seized. These property rights are returned at the end of the war. In a similar fashion, the right to bring a cause of action is suspended just as if it were seized or impounded. The alien cannot use our courts during a time of war. Borovitz v. American Hard Rubber Co., 287 F. 368 (ND Ohio1923). War clearly tolls the statute of limitations under federal common law principles.

Likewise, under Utah state law, when a person is an alien or citizen of a country at war with the United States, the time of the continuance of the war is not part of the period limited for the commencement of the action. Section 78-12-39, Ut.Code (1953). In Pratz v. International Smelting Co., 213 P.187 (Ut.1923), the Utah Supreme Court held that the two year statute of limitations for a wrongful death action was tolled during WWI because the personal representative was a resident of Hungary, an enemy country. Utah law also tolls the statute of limitations

from running in wrongful death actions until a minor heir reaches the age of majority. Section 78-12-20(minority tolls limitation period for bringing action), -21(time under disability is not part of time limited for commencement of action), Utah Code. The Utah statute of limitation also tolled by war. Section 78-12-39 Utah Code If the statute of limitation is tolled it extends the time in which a remedy be sought for the cause of action. Switzer v. Reynolds, 606 P.2d 244, 245 (Ut.1980). Utah also recognizes that a statute of limitation can be tolled when "exceptional circumstances make it unjust or irrational to bar the cause of action. Myers v. McDonald, 635 P.2d 84 (Ut.1981).

The statute of limitations should be tolled by the extraordinary circumstances that arose from the Vietnam War. The United States withdrew its troops from Vietnam in 1975. The country was left to the invasion of the communist troops. The U.S. had no diplomatic or trade relations with the country of Vietnam after our troops were withdrawn. The United States lifted the trade embargo against Vietnam on February 3, 1994; President Clinton announced he was normalizing relations with Vietnam on July 11, 1994; and official recognition came with the appointment of the first U.S. Ambassador to Vietnam after the war ceased on April 10, 1997.

The relations were normalized in 1995 to increase contact between Americans and Vietnamese people to advance the cause of freedom and to bring Vietnam into the community of nations. Public Papers of the Presidents of the United States,William J.

Clinton, Bk.II-July 1 to Dec. 31, 1995, 1073-74 (US GPO 1996). The first U.S. Ambassador after the war was sent to expand cultural and educational ties, to share information concerning POWs locations, and to establish a full diplomatic relationship. Cong.Rec. Vol. 143, No. 42, S3006-S3010 (April 10, 1997). One month before the Ambassador was sent, the two countries made an agreement to repay money owed the U.S. by South Vietnam for roads, power stations, and grain shipments during the war. Id., S3006.

When the U.S. placed an Ambassador in Vietnam in 1997 it was recognizing the government and state of Vietnam. Such recognition had been withheld since the war, after the U.S. withdrew forces. Recognition is "an official act, such as an exchange of Ambassadors, that acknowledges existence of a government and indicates readiness to engage in formal relations with it. Plano, J and Olton, R, The International Relations Dictionary, 4th Ed. (1988, ABC-CLIO), Para. 338. The recognition of the state indicates a desire to establish access to national courts where rights and duties in the legal relations of the two parties can be defined and controversies resolved. Id., para. 339.

Without recognition and normalizing relations, the citizens of Vietnam are precluded from travel to the United States. The United States would not recognize their passports. A passport is "a legal document issued by a state, which identifies the individual and attests to his or her nationality. ... They are also requests to foreign governments to allow the bearer to travel or sojourn within their jurisdiction and

to grant lawful aid and protection. Id. The Ambassador presides over the activities of the U.S. State Department in Vietnam. One of those functions is to facilitate visas, which allow entry of citizens of Vietnam into the United States. The citizens of Vietnam, domiciled in their home country, without recognition of their government and state, did not have the right to travel to the U.S., to apply for a visa, to use the courts of our country to resolve disputes, or to vindicate their rights. They were effectively denied access to our courts until formal recognition of their government and country on April 12, 1997. This disability tolled the statute of limitations until April 12, 1997.

To determine when the citizens of Vietnam, domiciled there, should be held accountable for and suffer the lost opportunity of exercising or using their right to seek compensation for damages they suffered in the My Lai massacre, or when they had a duty to file their causes of action under a *Bivens* action or an ATCA action, this Court should determine when they had an opportunity to do so. They could not be accountable for failing to exercise this duty before they could get a passport recognized by the United States, before they could secure a visa to come here, or before they could engage in educational and cultural exchanges where they could learn that our country and our constitution protects certain individual rights and allows compensation to victims whose rights are deprived by U.S. actors.

The Vietnam War brought an end to cultural, educational, and civic interaction between plaintiffs

and the United States. Most of the 45 survivors of the massacre were children. This disability precluded their access to the courts within the United States. No one would doubt that a one year old child who is an heir of a victim of the My Lai massacre would have until he reaches age 18 before the limitation period begins to run. This would be from 1968 to 1985. Then, if he were to get ten years under the ATCA, he would have until 1995 to file a cause of action. The dispute that arises is whether the statute of limitation should have been tolled until 1997, because of the extraordinary circumstances that arose from the Vietnam War. This access to our courts was only restored after the war ended, the government was recognized and the United States was again willing to encourage travel, cultural and educational exchanges, and the use of the national courts to resolve differences. These circumstances tolled the statute of limitations until April 12, 1997. Both actions are timely.

This rule furthers the policy that there is no safe haven for death squads in the United States. Barrueto v. Larios, 205 F.Supp.2d 1325. This policy is especially strong if these death squads are members of our own armed forces.

The Tenth Circuit used the state statute for tolling the statute of limitations. Appdx. A at 8a. Generally, when state statutes concerning tolling are not inconsistent with federal civil rights actions, state tolling laws apply. Johnson v. California, 207 F.3d 650 (9th Cir. 2000), after remand, 321 F.3d 112 (9th Cir.2003); Corcoran v. NY Power Auth., 202 F.3d 530

(2d Cir. 1999). The Courts below have used state law to frustrate the purposes of the Alien Tort Statute and a *Bivens* cause of action by failing to give proper weight to the extraordinary circumstances that arose from the war; and how those concepts, which arise from federal and international law, like trade barriers, lack of recognition, failure to normalize relations, deprived the victims of the My Lai massacre of access to our courts.

c. The state tolling provision frustrates important federal policy and was improperly applied to time-bar the *Bivens* and ATCA claims.

Federal courts may adopt any state tolling rules that are not at odds with federal law. Board of Regents v. Tomanio, 446 U.S. 478, 483-86, 64 L.Ed.2d 440(1980).

A *Bivens* action is tolled where a defendants's wrongful conduct, or extraordinary circumstances outside a plaintiff's control, prevented a plaintiff from timely asserting a claim. Hilao, 103 F.3d at 773. See Hardin v. Straub, 490 U.S. 536, 104 L.Ed.d 582 (1989).

A state law on tolling from the forum state should not be used if it frustrates the policy in the federal law on which the claim is based. Strawn v. Missouri, 210 F.3d 954 (8th Cir.2000). When there is a national nature of the claim, and because of the multistate geographic nature of the cause of action. A state tolling provision would permit forum shopping, complex and expensive litigation in what should be a

straight forward matter. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 115 L.Ed.2d 321 (1991).

These actions clearly state a national claim based upon international law and the U.S. constitution for egregious breaches of these standards of conduct abroad. If the statute of limitations and tolling provisions apply from the forum state, then forum shopping will result. For example, Capt. Medina was dismissed without prejudice because the court held it did not have jurisdiction over him because he lacked minimum contacts with the Federal District of Utah so the court did not have personal jurisdiction over him. Plaintiffs are now free to refile their cause of action in his home state of Wisconsin. His state statute of limitation provides that "the time of the continuance of [a] war is not a part of the time limited for the commencement of the action." Wisconsin Stat.Annot., Section 893.20. Arguably, the limitation period for bringing an action did not begin to run until April 12, 1997. The federal causes of action would be timely in Wisconsin if the 10 year limitation period applies.

Likewise, Plaintiffs may argue the statute of limitations in Georgia, where Lt. Calley lives, is tolled by the Vietnam War, Plaintiffs' minority, and the lack of recognition of the country and the other circumstances that arose after the war ended. This forum shopping may be used to defeat the federal policies that should be uniform. In Forti, supra, the court recognized that the law should promote one forum, and a uniform law, for claims for violations of international rights.

Plaintiffs were under the disability that arose from the War in Vietnam until April 12, 1997. The statute of limitations from the TVPA should be applied to both the *Bivens* and the ATCA action. It should be based on federal law, not state law, to provide a uniform remedy, to give proper importance to federal and international issues, and to avoid the expense of multidistrict litigation. The statute of limitation was tolled until recognition of the country, the end of the trade embargo, and normalization of relations with the country and government of Vietnam in 1997. It does not run until 2007. The cause of action was timely filed.

IV. Review by this Court is Important to address additional Important issues raised by the Tenth Circuit.

a. Plaintiffs should have an opportunity to present evidence in support of tolling the statute of limitation.

This cause of action was dismissed on a motion to dismiss. The Tenth Circuit has held that plaintiffs have the burden of establishing a factual basis for tolling statues of limitation. Aldrich v. McCulloch Properties, Inc., 637 F.2d 1036, 1041 n. 4 (10th Cir. 1980). But here, plaintiffs did not ever have an opportunity to present facts that may meet their burden of proof. The district court in deciding the statute of limitations on a motion to dismiss, said the issue is whether plaintiffs are entitled to offer

evidence to support their claims. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The court then dismissed the action, including dismissing *sua sponte* the cause of action against Lt. Rusty Calley, and denying the opportunity to establish or even present facts that support tolling the statute of limitations. A Motion to dismiss is based upon the pleadings. Fudge v. Penthouse Intl. 840 F.2d 1012, 1015 (1st Cir.) Cert denied 102 L.ed.2d 42 (1988). No evidence is considered. It is conceded that if it is futile to amend the complaint then leave need not be given. See Deutsch v. Turner Corp. 324 F.2d 692 at 717 (9th Cir. 2003), where there was no fact that could toll the statute of limitation for 40 years so it was futile to allow an amendment to the complaint.

In the action against Pres. Marcos of the Phillipines, the statute of limitations was tolled until he left office because he had granted himself immunity from suit. This fact was established by expert witness at trial. Hilao, 103 F.3d at 773.

As stated in Reeser v. Cabot Corp., 223F.Supp.2d 644 (ED Pa 2002). A plaintiff has the burden of proof that his lawsuit is not too late. Id. at 648. Whether the statute of limitation should be tolled is a fact question. The factual inquiry should be into whether the plaintiffs exhibit "those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of others. Reeser, 223 F.Supp.2d at 648. The exercise of reasonable diligence is an objective rather than a subjective standard. Id.

Plaintiffs have been precluded from showing or setting forth facts because this motion was decided on a motion to dismiss. This Court should remand this matter to the district court to allow Plaintiffs to present evidence in support of tolling the statute of limitations.

b. Defendant Calley should not be dismissed with prejudice because he did not join in the motion, he may be liable in another forum, and he should not be protected when other defendants may not have the same protection for the same conduct.

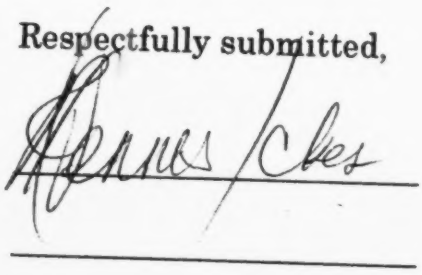
Defendant Lt. Calley, the commander of the troops at My Lai, was dismissed with prejudice when he did not even join in the motion to dismiss. He raised an issue in his answer that the court lacked personal jurisdiction over him. But this issue was never reached. If the trial court lacked personal jurisdiction the proper remedy would be to dismiss him without prejudice. Such a ruling was issued in favor of Defendant Capt. Medina. The action may be filed against him in another jurisdiction. A similar result should follow for Defendant Lt. Calley.

c. It was an abuse of discretion to award attorneys fees when the cause of action was timely, or there was a valid and reasonable belief that such cause of action was timely.

The district court awarded attorneys fees against counsel and plaintiffs because, in part, it felt the statute of limitation had run. See Appdx. B. If this Court finds the statute of limitations was tolled by the extraordinary circumstances that followed the War in Vietnam, then it was an abuse of discretion to award these attorneys fees to Defendant Terry. This ruling should be reversed and remanded so the trial court could determine whether any attorneys fees should be awarded if the action is timely.

For the reasons stated above, the Petitioners pray that this Court will grant the Petition for Writ of Certiorari.

Respectfully submitted,



APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND DECIDED APRIL 16, 2004, in Van Tu v. Maj. Gen. Koster, et al., Case No. 02-4209

FILED United States Court
of Appeals Tenth Circuit
APR 16 2004
PATRICK FISHER Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

HOANG VAN TU; NGUYEN THI KHUONG; NGUYEN DINH; TRAN NAM; TRUONG TRAIN; PHAM DAT; PHAM THI THUAN, individually and as representatives of the class of victims of the My Lai Massacre,

No. 02-4209

Plaintiffs-Appellants,

v.

MAJOR GENERAL KOSTER; LT. COL. HOLLADY; COL. YOUNG; CPT. RIGGS; CPT. MICHLES; CPT. ERNEST L. MEDINA; LT. WILLIAM RUSTY CALLEY; PT. MICHAEL TERRY; UNITED STATES OF AMERICA,

Defendants -Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
(D.C. No. 2:00-CV-807-DB)

Submitted on the briefs:

S. Austin Johnson of Johnson Law Firm, P.C., Orem, Utah, for Plaintiffs-Appellants.
Drew Briney, Spanish Fork, Utah, for Defendant-Appellee Michael Brent Terry.

Paul M. Warner, United States Attorney, District of Utah; Barbara Biddle, Assistant Director, Appellate Staff Civil Division, U.S. Department of Justice; Robert M. Loeb, Special Appellate Counsel, Appellate Staff Civil Division, U.S. Department of Justice; Jeremy S. Brumbelow, Trial Attorney, Torts Branch, Civil Division, U.S. Department of Justice, Washington, D.C., for DefendantsAppellees Ernest L. Medina and the United States of America.

Before BRISCOE and McKAY, Circuit Judges, and BRORBY, Senior Circuit Judge.

BRISCOE, Circuit Judge.

Plaintiffs appeal from the district court's order dismissing their complaint on statute-of-limitations grounds. We affirm.(1)

FACTS

Plaintiffs are residents of the Village of Son My, Quang Ngai Province, in the Republic of Vietnam. They bring this action on their behalf and as representatives of deceased victims and survivors of the My Lai Massacre. The My Lai Massacre occurred on March 16, 1968, during

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(1) After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). This case is therefore ordered submitted without oral argument.

the Vietnam War, when members of the United States military allegedly committed atrocities, including murder, against civilian residents of the village of Son My (My Lai).

Plaintiffs filed this suit over thirty-two years after the fact, on October 12, 2000. They named a Utah defendant, Private Michael B. Terry, and several other American soldiers who allegedly committed violations of the Law of War. On September 23, 2002, the district court entered an order dismissing the entire action, with prejudice, on statute-of-limitations grounds.

ANALYSIS

Plaintiffs' complaint advances claims under 42 U.S.C. § 1983, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and the Alien Tort Statute, 28 U.S.C. § 1350. The district court concluded that plaintiffs had no cause of action under *Bivens* or § 1983. It further concluded that Utah's four year statute of limitations for personal injury claims barred plaintiffs' § 1983 claims. Finally, it concluded their § 1350 claims were time-barred because they were not brought within ten years. We review the district court's application of the statute of limitations *de novo*. United *States v. Hurst*, 322 F.3d 1256, 1259 (10th Cir. 2003).

1. Section 1983/*Bivens* claims

Plaintiffs' complaint does not state a claim under § 1983 because the activities of the United States military were not taken under the color of state law. *See Dry v. United States*, 235 F.3d 1249, 1255-56 (10th Cir. 2000). Plaintiffs

appear to concede this deficiency. On appeal, they argue that their action actually was brought under *Bivens*. See Aplt. Opening Br., No. 02-4209, at 5-6.

The availability of a *Bivens* remedy is also questionable. *See, e.g., Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (1985) ("[T]he special needs of foreign affairs must stay our hand in the creation of damage remedies [under *Bivens*] against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad."). We need not decide whether *Bivens* applies, however, because plaintiffs' *Bivens* claim is, in any event, barred by the statute of limitations.

Bivens is a judicially created remedy that does not have its own statute of limitations. *Indus. Constructors Corp. v. United States Bureau of Reclamation*, 15 F.3d 963, 968 (10th Cir. 1994). *Bivens* actions generally borrow the general personal injury limitations statute in the state where the action arose. *Id.*

Cognizant of this rule, plaintiffs assert that their action "arose" in Vietnam, rather than in Utah. Vietnam is not, of course, a state of the Union; it is a foreign state. Plaintiffs cite no authority to support their claim that the law of a foreign state may be borrowed to create a Bivens statute of limitations. They also present no argument favoring Vietnamese law under choice of law principles, beyond a bare assertion that the action "arose" in Vietnam.
[-4-]

Plaintiffs argue that Vietnam's Communist government has established no statute of limitations for personal injury because it does not recognize the right of citizens to bring tort suits. Given this void in Vietnamese law, we are not asked to choose between two conflicting state limitations statutes, *see id.* at 968 n.4; instead, we are asked to disregard the law of the forum state, Utah, in favor of a non-existent, and therefore hypothetically unlimited, foreign statute of limitations. Plaintiffs give us no reason to do so.

Plaintiffs also argue since Vietnam is a signatory to the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,* adopted by the United Nations General Assembly on November 26, 1968,(2) and since Article 1 of this Convention makes limitations statutes inapplicable to "war crimes" or "crimes against humanity," we should apply the treaty and hold that there is no statute of limitations. The United States is not a signatory to this Convention. Plaintiffs present no authority for applying an unlimited statute of limitations contained in a treaty ratified by a foreign: state, but not the United States, to a *Bivens* claim. If this were not enough reason to reject plaintiffs' argument, we note also that the Convention refers exclusively to prosecution for crimes, not to tort liability.

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(2) The convention may be found at htlp://www.unhchr.ch/htmi/menu3/b/12 limit.htm (visited March 4, 2004).

Plaintiffs chose Utah as the forum state in which to bring this action. Utah provides a four-year residual statute of limitations for personal injury actions, which we will apply to plaintiffs' *Bivens* claims. Utah Stat. Ann. § 78-12-25(3). *Cf. Sheets v. Salt Lake County*, 45 F.3d 1383, 1387 (10th Cir. 1995);(applying § 78-12-25(3) to § 1983 action).

Although state law establishes the statute of limitations, federal law determines when plaintiffs' federal *Bivens* claims accrued. *Industrial Constructors*, 15 F.3d at 969. Under federal law, the statute of limitations on a *Bivens* claim "begins to run when the plaintiff knows or has reason to know of the existence and cause of the injury which is the basis of his action." Id. We agree with the district court that plaintiffs had reason to know of the existence and cause of their injuries when they occurred, on March 16, 1968, and therefore, absent tolling, which we address later in this opinion, they should have filed their suit no later than March 16, 1972. The district court therefore correctly determined that plaintiffs' *Bivens* claims were untimely.

2. Claims under Alien Tort Statute

The Alien Tort Statute provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The Statute itself provides no time bar for such actions. Although we

have not previously decided what statute of limitations applies to an action under the Statute, most other courts considering the issue have borrowed the ten-year statute of limitations contained in the Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73 (1992), 28 U.S.C. § 1350 *note*, § 2(c) (TVPA), as the most analogous federal statute of limitations. *See, e.g., Deutsch v. Turner Corp.*, 324 F.3d 692, 717 & n.18-09th Cir.), *cert. denied*, 124 S. Ct. 105, 132, 133 (2003); *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 118-19 (D.D.C. 2003).

Plaintiffs argue that it is inappropriate to borrow the statute of limitations associated with the TVPA, because they have not filed their action as torture victims. Beyond this general observation, they provide no discussion of the governing principle, the "most closely analogous statute of limitations rule." *See Deutsch*, 324 F.3d at 717 n.18. Once again, they merely assert that Vietnamese law, which contains no statute of limitations, is more appropriate because the tort occurred in Vietnam. We conclude that the TVPA is more closely analogous to the Alien Tort Statute action than the law of Vietnam. The district court properly determined that plaintiffs were required to bring their action within the ten-year statute of limitations, and that they failed to do so.
[-7-]

3. Equitable tolling

Plaintiffs argue that the aforementioned statutes of limitations should be tolled because of exceptional circumstances. We agree with the district court that even if some degree of equitable tolling were appropriate on the basis of plaintiffs' poverty, their status as subjects of a Communist government, the Vietnam War, and their inability to travel, plaintiffs have made no showing sufficient to justify tolling the *Bivens* claim for twenty-eight years, and their Alien Tort Statute claim for twenty-two. We therefore reject their equitable tolling argument.

4. Application to Calley

Finally, plaintiffs argue that the district court should not have dismissed defendant Calley on statute-of-limitations grounds, because he waived the defense by failing to raise it in his motion to dismiss. Calley filed a pro se motion to dismiss, which the district court denied. He then filed an answer to the complaint, in which he asserted several affirmative defenses, including the statute of limitations.

Plaintiffs' waiver argument is rneritless. Rule 8(c) of the Federal Rules of Civil Procedure requires a party to include the defense of statute of limitations in his responsive pleading. Calley properly raised the defense in his answer. It is therefore irrelevant that he did not present it in his motion to dismiss. *See, e.g.,*
[-8-]

Robinson v. Johnson, 313 F.3d 128, 135 (3d Cir. 2002), cert. denied, 124 S. Ct. 48 (2003); *Expertise, Inc. v. Aetna Fin. Co.*, 810 F.2d 968, 973 (10th Cir. 1987). Further, although Calley did not join in Terry's motion to dismiss, the district court could *sua sponte* grant dismissal on the pleadings for Calley, particularly when another motion to dismiss on the same basis was already pending. See 2 James William Moore, *Moore's Federal Practice* § 12.38 & n.3 (3d ed. 2003) ("Any party may move for judgment on the pleadings, or the court may act *sua sponte*.").

The district court properly dismissed plaintiffs' complaint against all defendants as untimely. The judgment of the district court is AFFIRMED.
[-9-]

APPENDIX B - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND DECIDED APRIL 16, 2004, in Van Tu v. Maj. Gen. Koster, et al., Case No. 03-4041.

FILED
United States Court of Appeals
Tenth Circuit

APR 16 2004

PATRICK FISHER
Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

HOANG VAN TU; NGUYEN THI KHUONG; NGUYEN DINH; TRAN NAM; TRUONG THAIN; PHAM DAT; PHAM THI THUAN, individually and as representatives of the class of victims of the My- Lai Massacre, Plaintiffs-Appellants, MAJOR GENERAL KOSTER; LT. COL. HOLLADY; COL. YOUNG; CPT. RIGGS; CPT. MICHLES; LT. WILLIAM RUSTY GALLEY; UNITED STATES OF AMERICA, Defendants, PT. MICHAEL TERRY, Defendant-Appellee.	No. 03-4041 (D.C. No. 2:00-CV-807-DB) (D. Utah)

ORDER AND JUDGMENT*

Before BRISCOE and McKAY, Circuit Judges, and BRORBY, Senior Circuit Judge.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata,

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). This case is therefore ordered submitted without oral argument.

Plaintiffs appeal from the district court's order awarding attorney's fees and costs in favor of defendant Michael B. Terry. We affirm.

FACTS

The parties are familiar with the facts, and we will summarize them only briefly. On October 3, 2002, Terry moved for an award of attorney's fees and costs. The district court heard arguments on the attorney-fee issue. Finding that plaintiffs had acted in bad faith in their interactions with Terry, it entered an order awarding attorney's fees and costs to Terry in the amount of $12,055.50, from which the plaintiffs filed an amended notice of appeal.

Although Terry had requested that the district court award fees and costs against both plaintiffs and their attorneys, S. Austin Johnson and Johnson Law Firm P.C. (hereafter referred to collectively as "Johnson"), the and district court's order did not specify whether it was plaintiffs or Johnson who are responsible for the attorney's fees and costs. In any event, Johnson did not file an appeal in his own name from the award of attorney's fees and costs.

(cont.)
collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Nearly a year later, in December 2003, Terry filed a motion asking the . district court to clarify that its order awarding fees and costs ran against Johnson as well as plaintiffs, and that Johnson was jointly and severally liable for the fees and costs. On January 14, 2004, the district court granted Terry's motion to clarify and amended its previous order to state that plaintiffs and Johnson are jointly and severally liable for t-h-a $12,055..50 awarded to Terry for fees and costs. Johnson did not appeal from this order.

1. Johnson's failure to appeal

Plaintiffs' notice of appeal from the order imposing attorney's fees and costs failed to name Johnson as a party. Johnson did not appeal from the district court's later order clarifying Johnson's responsibility for the fees and costs. We therefore lack jurisdiction to review the attorney fee and cost awards against Johnson. *See Jane L. v. Bangerter*, 61 F.3d 1505, 1513 n.3 (10th Cir. 1995).

2. Plaintiffs' appeal

The district court awarded fees to Terry under its inherent power to sanction conduct that abuses the judicial process. While "the so-called `American Rule' prohibits fee shifting in most cases . . . a court may assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or fir oppressive reasons." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991) (quotation omitted). We review the district court's award of fees under this "bad faith
[-3-]

exception" for an abuse of discretion. *United States v. McCall,* 235 F.3d 1211,1216 (10th Cir. 2000). "The bad faith exception is drawn very narrowly and may

be resorted to only in exceptional cases and for dominating reasons of justice." Id. (quotation omitted).

The district court explained the reasons for its award of attorney's fees and costs to Terry as follows:

> Based on [their] representations [in the letter to Terry], plaintiffs obtained a default judgment against an unrepresented Mr. Terry. In effect, plaintiffs conspired with an unsuspecting Mr. Terry to obtain a judgment that, despite plaintiffs' suggestions, was completely personal and individual to Mr. Terry. At oral argument, plaintiffs' counsel . . . stated that plaintiffs' intent was to help Mr. Terry. Plaintiffs' actions did not help Mr. Terry in any way but led him to incur legal bills in excess of ten thousand dollars. Plaintiffs' scheme and treatment of Mr. Terry can only be described as bad faith, oppressive, and beyond the boundaries of appropriate litigation practices.

Aplt. App., No. 03-4041, at 99.

Plaintiffs advance the following argi:wents in opposition to the district court's findings: (1) they did not mislead the court in their arguments concerning the default judgment; (2) the letter to Terry was written by an associate of the Johnson firm who was later fired for writing letters without Johnson's knowledge; (3) they did not conspire with Terry to obtain a judgment; (4) they never counseled Terry to default in the case, and in fact sought a default judgment against him only when he failed to respond to their attempts to communicate with

him; and (5) their intention was to offer Terry a stipulated judgment that would protect him from any personal liability.

Upon review, having considered these arguments and reviewed the record in light of the applicable standards, we conclude that the district court did not abuse its discretion in awarding attorney's fees and costs to Terry. We therefore affirm the order of the district court awarding attorney's fees and costs.

Entered for the Court
Mary Beck Briscoe
Circuit Judge

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APPENDIX C - OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, DATED AND DECIDED SEPTEMBER 23, 2002, in Van Tu v. Maj. Gen. Koster, et al., Case No.2:00-CV-807B.

FILED

IN THE UNITED STATES DISTRICT COURT
23 S ep 02 AM10:29
DISTRICT OF UTAH - CENTRAL DIVISION

HOANG VAN TU, et al.,

Plaintiffs,

MEMORANDUM OPINION AND ORDER

VS.

Case No.: 2:00-CV-807B

MAJOR GENERAL KOSTER, et al.,

Defendants.

Before the Court is defendant Michael B. Terry's motion to dismiss plaintiffs' complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Specifically, defendant asserts that plaintiffs' complaint must be dismissed in its entirety because it is barred by the relevant statutes of limitation and there is not sufficient cause to justify a tolling of the pertinent time periods. Defendant asserts a variety of other arguments to support his position that plaintiffs' complaint must be dismissed. However, finding that the statute of limitation question disposes of the instant lawsuit, the Court will not fully explore defendant's further arguments.(1)

(1)Plaintiffs have filed a claim under 42 U.S.C. § 1983, alleging that their constitutional rights were violated by state actors acting under "color of state law." Irrespective of the statute of limitations question, plaintiffs' § 1983 claim fails because plaintiffs have sued defendant for alleged actions taken under color of *federal* law, not state law, and "[s]ection 1983 has no application

Accordingly, having considered the parties' briefs, oral arguments, and the relevant law, the Court issues the following Memorandum Opinion and Order.

BACKGROUND

A. Factual Background

On March 16, 1968, the United States Armv invaded the South Vietnam village of .My Lai and numerous soldiers allegedly raped and executed over five-hundred South Vietnamese civilians. The soldiers also set fire to the village, burning the civilians' homes to the ground. This incident is commonly known as the "My Lai Massacre." Plaintiffs are residents of the village of Son My, Quang Ngai Province, Vietnam, and are survivors of the incident.

In 1998, a Utah citizen saw a special newsreport explaining what allegedly occurred in My Lai on March 16, 1968. Believing that the survivors of the My Lai

(1)cont., to federal officers acting pursuant to federal law." *Kite v. Kelley*, 546 F.2d 334, 337 (10th Cir. 1976). Because causes of action under § 1983 only remedy state law violations, plaintiffs' § 1983 claim fails as a matter of law.

Plaintiffs also assert claims based on alleged violations of the United States Constitution in accordance with *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotic*, 403 U.S. 388 (1971). *Bivens* claims exist only where alleged violations of federal Law or constitutional rights have occurred and to recover under such a cause of action, plaintiffs must be entitled to the protections of the violated federal law or constitutional right. In the instant case, plaintiffs are not entitled to such protections. It is undisputed that at the time of the My Lai Massacre, plaintiffs were South Vietnamese citizens. As such, plaintiffs enjoyed no protections of the United States Constitution and therefore the Court must dismiss all of plaintiffs' *Bivens* claims.

Massacre might have a cause of action under United States law, the Utah citizen hired an attorney, traveled to Vietnam to obtain consent from the villagers to prosecute the instant lawsuit, and found a Utah defendant, enabling plaintiffs to file the instant lawsuit before this Court. The Utah defendant, and movant herein, is Private Michael B. Terry.

Defendant Michael B. Terry was a fire team leader in the third platoon of Charlie Company on March 16, 1968, and as such, plaintiffs assert that defendant Terry assisted in implementing, directing and carrying out the United States Military Operation against the village of My Lai. Specifically, plaintiffs allege that defendant Terry "and those soldiers under his command were responsible for several mercy killings involving critically injured and untreatable civilians who were enduring extreme suffering from their terminal wounds." Plaintiffs assert that defendant acted under color of state law and with the authority of the United States of America.

On October 12, 2000 - more than 32 years after the alleged massacre occurred - plaintiffs filed the instant action arguing that defendant Terry, among others. "should be liable for money damages for . . . wrongful death, pain, and suffering, permanent disfigurement, battery, severe emotional distress, decreased enjoyment of life, loss of consortium, lost wages and earning capacity; past and future, and property damage." Plaintiffs further request "economic reparations," including "punitive damages to deter future atrocities;" damages for "wrongful death," and attorneys fees. Plaintiffs brought their claims under 42 U.S.C. § 1983 and the Alien Tort Statute, 28 U.S.C. 1350.

Defendant now moves the Court to dismiss plaintiffs' complaint in its entirety, arguing that plaintiffs' causes of action are time-barred by all relevant statutes of limitation.

B. Standard of Review

In ruling on defendant's motion to dismiss, the Court assumes the truth of all well-pleaded facts in plaintiffs' complaint and views them in the light most favorable to plaintiffs. *See Zinermon v. Burch*, 494 U.S. 113, 118 (1990); *Roman v. CessnaAircraft Co.*, 55 F.3d 542, 543 (10" Cir. 1995). The Court views all reasonable inferences in favor of plaintiffs, and the pleadings are liberally construed. See id. In reviewing the sufficiency of a complaint, the issue is not whether plaintiffs will prevail, but whether plaintiffs are entitled to offer evidence to support their claims. *See ,Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974).

DISCUSSION

Statutes of Limitation

Defendant argues that plaintiffs' case must be dismissed because it violates all applicable statutes of limitation time periods. Specifically, defendant argues that plaintiffs' claims under § 1983 and the Alien Tort Statute fail because they were filed long beyond the statutory cut-off periods. The Court will consider each cause of action in turn.

1. Plaintiffs'Section 1983 Claim

Plaintiffs first assert,that they are entitled to relief under 42 U.S.C. § 1983 because defendant, as an officer of the United States Army, acted under color of state law when, during an official military operation, civilians were allegedly raped and executed in the village of My Lai. Plaintiffs claim they are entitled to monetary damages for the pail and suffering they incurred as a result of this incident.

To support a valid § 1983 claim, the Court must find that plaintiffs' complaint was filed within the relevant statute of limitation time period for § 1983 claims. Both the United States Supreme Court and the Tenth Circuit Court of Appeals have found that the limitations period for claims brought pursuant to § 1983 is determined by borrowing the forum state's statute for

personal injury actions. *See Owens v. Okure, 488 U.S. 235 (1989); Industrial Construction Corp. v. United States Bureau of Reclamation, 15 F.3 d 963, 968 (10" Cir. 1994).*

The Tenth Circuit has also held that federal law determines when these claims accrue: "the statute of limitations begins to run when the plaintiff knows or has reason to know of the existence and cause of the injury which is the basis of his action." Industrial Construction Corp., at 968-69. In Utah, the limitations provision for personal injury claims is Utah Code Ann. § 7812-25(3), which requires the action to be filed within four years of accrual.

It is undisputed that plaintiffs knew they had suffered personal injuries at the time of the My Lai Massacre on March 16, 1968. Accordingly, to have timely filed their § 1983 claim in Utah federal district court, plaintiffs must have filed their complaint by March 16, 1972 - over 30 years ago. Thus, plaintiffs are clearly time-barred in tiling their § 1983 claim. Plaintiffs' § 1983 cause of action will'therefore only survive if the Court finds it justified to toll the statute of limitations time period, as discussed below.

2. Plaintiffs'Alien Tort Slatute Claim

Similarly, with respect to plaintiffs' Alien Tort Statute claim, the Court finds that plaintiffs' claim is time-barred by the relevant statute of limitation. The Alien Tort Statute provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2002). However, the statutory notes provide that "[nlo action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose." Id. Accordingly, to have timely tiled their complaint under the Alien Tort Statute, plaintiffs must have filed their complaint in the district court by March 1.6, 1978 - over 24 years ago. Plaintiffs have clearly failed to meet that time frame. Accordingly, unless the Court

finds that the statuteof limitation time period under the Alien Tort Statute is tolled for at least twenty-two years, plaintiffs' claim must fail.

B. Tolling of the Statutes of Limitations

Having found that the statutes of limitation time periods have run under both § 1983 and the Alien Tort Statute, the Court must now determine whether circumstances exist to justify tolling the relevant time periods, thereby allowing plaintiffs' claims to survive. The Tenth Circuit has held that plaintiffs have "the burden of establishing a factual basis for tolling statutes of limitation." *Aldrich v. McCulloch Properties, Inc.*, 637 F.2d 1036, 1041 n.4 (10'" Cir. 1980). In Utah; a statute of limitation can be tolled only when "exceptional circurnstances make it unjust or irrational to bar the cause of action." *Myers v. LV&Donald*, 635 P.2d 84 (Utah 1981).

In the instant case, plaintiffs list a variety of factors to support their claim that "exceptional circumstances" exist to justify tolling the relevant time periods. Specifically, plaintiffs argue that because they were under the rule of communism, plaintiffs could not travel to the United States to file a claim. Plaintiffs also contend that because they are poor, uneducated, and have had no opportunity to travel, it was impossible for them to bring a claim before now. Conversely, defendant argues that plaintiffs have had ample opportunities to find a way to file a claim through foreign visitors and radio or television communication. Defendant argues that plaintiffs had sufficient opportunity to bring a claim under either statute before the time period had run and to do so now - some 32 years after the underlying incident occurred - is not justified under the law.
[6]

Having considered the parties' arguments, the Court agrees with defendant and finds that there are insufficient reasons to permit equitable tolling of the relevant time periods for the number of years required to allow plaintiffs' claims to survive. Even if some equitable tolling period was justified due to plaintiffs' circumstances, the Court cannot justify toiling the two statutes of limitation for a period of more than 22 years. Statutes o f limitation serve an important purpose in our system of justice. Memories fade; evidence is lost, witnesses die, and the ability of the justice system to effectively search for the truth, redress grievances and cornpdnsate those harmed significantly diminishes as time passes. 'this is clearly the case in the instant lawsuit. Tow that over three decades have passed since the My Lai Massacre occurred, plaintiffs' claims are too stale and the reasons given for the untimely filing of the lawsuit are insufficient to survive defendant's motion to dismiss.

CONCLUSION

Having found that plaintiffs' complaint violates all applicable statutes of I imitation, and that there is no justification to toll the statutes under the circumstances of this case, the Court GRANTS defendant's motion to dismiss plaintiffs' complaint in its entirety. Plaintiffs' case is DISMISSED WITH PREJUDICE.

DATED this 20th Day of September, 2002.

Dee Benson
United States District
Judge

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